Nos. 09-498 and 09-499

In the Supreme Court of the United States

ISMAEL JOHN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PEOPLE OF BIKINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 1983, the people of the Marshall Islands approved by popular vote a Compact of Free Association between the Government of the United States and the Government of the Marshall Islands. As part of the Compact, the Government of the Marshall Islands espoused and settled claims of its citizens against the United States arising out of the nuclear testing program conducted in the Marshall Islands between 1946 and 1958. In the Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986), Congress ratified the Compact's espousal provisions as a "full and final settlement" of all claims arising from the nuclear testing program, and enacted the Compact's provision that "[n]o court of the United States shall have jurisdiction to entertain such claims." The questions presented by this case are:

1. Whether the Compact of Free Association Act bars the Court of Federal Claims from exercising Tucker Act jurisdiction to entertain petitioners' suits seeking just compensation for alleged takings of property arising out of the nuclear testing program in the Marshall Islands between 1946 and 1958.

2. Whether a challenge to the Government of the Marshall Islands' espousal and settlement of petitioners' claims against the United States involves a nonjusticiable political question.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 8
Conclusion 25

TABLE OF AUTHORITIES

Cases:

Antolok v. *Brookhaven Nat'l Labs.*, No. CV 82-2364 (C.D. Cal. Jan. 6, 1988) 5

Antolok v. *United States*:

873 F.2d 369 (D.C. Cir. 1989) 9, 23

Civil Action No. 83-02471 (D.D.C. June 16, 1987), aff'd, 873 F.2d 369 (D.C. Cir. 1989) 5

Battaglia v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948) 24

Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 14, 17, 20, 21

Department of HUD v. *Rucker*, 535 U.S. 125 (2002) 10

Doe v. *Braden*, 57 U.S. (16 How.) 635 (1854) 18, 19

Glosemeyer v. *Missouri-Kan.-Tex. R.R.*, 879 F.2d 316 (8th Cir. 1989), cert. denied, 494 U.S. 1003 (1990) 12

Hawaii v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009) 11

INS v. *St. Cyr*, 533 U.S. 289 (2001) 12

Juda v. *United States*, 13 Cl. Ct. 667 (1987), appeal dismissed, *People of Bikini* v. *United States*, 859 F.2d 1482 (Fed. Cir. 1988) 6

Langford v. *United States*, 101 U.S. 341 (1880) 23

Cases—Continued: Page

Lynch v. *United States*, 292 U.S. 571 (1934) 23
Miller v. *French*, 530 U.S. 327 (2000) 10
Neely v. *United States*, 546 F.2d 1059 (3d Cir. 1976) 12
People of Bikini v. *United States*, 859 F.2d 1482 (Fed. Cir. 1988) 6
People of Enewetak v. *United States*, 864 F.2d 134 (Fed. Cir. 1988), cert. denied, 491 U.S. 909 (1989) 6
Peter v. *United States*:
6 Cl. Ct. 768 (1984) 6
13 Cl. Ct. 691 (1987), aff'd *sub nom. People of Enewetak* v. *United States*, 864 F.2d 134 (Fed. Cir. 1988), cert. denied, 491 U.S. 909 (1989) 6
Porter v. *United States*, 496 F.2d 583 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975) 16
Preseault v. *ICC*, 494 U.S. 1 (1990) 12
Regional Rail Reorg. Act Cases, 419 U.S. 102 (1974) 12, 22
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) ... 12, 13
United States v. *Belmont*, 301 U.S. 324 (1937) 18
United States v. *Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511 (2008) 12
United States v. *Lee*, 106 U.S. 196 (1882) 23
United States v. *Pink*, 315 U.S. 203 (1942) 8, 18
Wisconsin Cent. Ltd. v. *Public Serv. Comm'n*, 95 F.3d 1359 (7th Cir. 1996) 24

Constitution, treaties and statutes: Page

U.S. Const. Amend. V 5, 7
Just Compensation Clause 5, 21, 23
Agreement for the Implementation of Section 177 of the Compact of Free Association, June 25, 1983, U.S.-Marsh. Is., Hein's No. KAV 4575 ..... 3, 16
Art. I 3
§ 1 14
Art. II 3
§ 6 3
§ 6(c) 13
§ 7(b) 3
Art. IV 13
§ 1 3
§ 1(a) 11, 13
Art. IX 4
Art. X 9
§ 1 4
Art. XII 4, 9, 12, 13, 14, 15
Compact of Free Association, June 25, 1983, 99 Stat. 1800, Hein's No. KAV 1271:
Preamble, 99 Stat. 1800 ..... 16, 19
§ 111, 99 Stat. 1801 20
§ 121(a), 99 Stat. 1801 20
§ 177, 99 Stat. 1812 ..... 3, 10, 14
§ 177(a), 99 Stat. 1812 3
§ 177(c), 99 Stat. 1812 4
§ 471(a), 99 Stat. 1834 ..... 3, 17
§ 471(c), 99 Stat. 1834 5

Treaty and statutes—Continued: Page

Trusteeship Agreement for the Former Japanese Mandated Islands, Apr. 2, 1947, 61 Stat. 3301, 8 U.N.T.S. 189 2
Art. 11(1), 61 Stat. 3304, 8 U.N.T.S. 196 16
Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986):
Preamble, 99 Stat. 1770 2
§ 101(b), 99 Stat. 1773 (48 U.S.C. 1901(b)) 3
§ 103(g)(1), 99 Stat. 1782 (48 U.S.C. 1903(g)(1)) 4, 10
§ 201, 99 Stat. 1800 2
Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720 5
§ 201(b), 117 Stat. 2808 5
Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, § 902, 106 Stat. 4516 6
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 24
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 39 6
Tucker Act, 28 U.S.C. 1491(a)(1) 11
28 U.S.C. 1502 20

Miscellaneous: Page

An Overview of the Compact of Free Association Between the United States and the Republic of the Marshall Islands: Are Changes Needed? Hearing and Briefing Before the Subcomm. on Asia, the Pacific, and the Global Environment of the House Comm. on Foreign Affairs, 110th Cong., 1st Sess. (2007) 7

Arthur J. Armstrong & Howard L. Hills, *The Negotiations for the Future Political Status of Micronesia (1980-1984)*, 78 Am. J. Int'l L. 484 (1984) 17

156 Cong. Rec. S54 (daily ed. Jan. 20, 2010) 7

H.R. Rep. No. 188, 99th Cong., 1st Sess., Pt. 1 (1985) ... 15

Louis Henkin, *Foreign Affairs and the Constitution* (1972) 17

Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986) 3, 19, 20

Proclamation No. 6726, 59 Fed. Reg. 49,777 (1994) 20

Republic of the Marshall Islands: Hearing on S. 1756 Before the Senate Comm. on Energy and Natural Resources, 110th Cong., 1st Sess. (2007) 7

S. 2941, 111th Cong., 2d Sess. (2010) 7

S.C. Res. 683, U.N. Doc. S/RES/683 (Dec. 22, 1990) 19

T.C. Res. 2183, U.N. Doc. T/RES/2183 (May 28, 1986) .. 19

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is published at 554 F.3d 996. The opinions of the Court of Federal Claims are published at 77 Fed. Cl. 788 (Pet. App. 11a-114a) and 77 Fed. Cl. 744 (09-499 Pet. App. 10a-107a).[1]

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 09-498.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2009. Petitions for rehearing were denied on May 27, 2009 (Pet. App. 115a-116a; 08-499 Pet. App. 108a-109a). On July 28, 2009, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including September 24, 2009. On September 14, 2009, the Chief Justice further extended the time to October 23, 2009, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Republic of the Marshall Islands (RMI) comprises 29 atolls and five islands in the Pacific Ocean. Pet. App. 2a. The Marshall Islands were formerly part of the Trust Territory of the Pacific Islands, which the United States administered pursuant to a United Nations-approved trusteeship from 1947 until 1986. See Trusteeship Agreement for the Former Japanese Mandated Islands (Trusteeship Agreement), Apr. 2, 1947, 61 Stat. 3301, 8 U.N.T.S. 189 (Pet. App. 281a-288a).

The trusteeship concluded with the adoption of a Compact of Free Association (Compact) between the Government of the United States and the Government of the Marshall Islands. See Compact of Free Association Act of 1985 (Compact Act), Pub. L. No. 99-239, § 201, 99 Stat. 1800 (1986) (Pet. App. 180a-248a) (setting out the text of the Compact). In September 1983, the people of the Marshall Islands approved the Compact in voting plebiscites monitored by observers from the United Nations. Compact Act preamble, 99 Stat. 1770 (Pet. App. 118a). In turn, Congress adopted and the President signed a joint resolution approving the Com-

pact, and the President duly proclaimed the Compact effective on October 21, 1986. Compact Act § 101(b), 48 U.S.C. 1901(b) (Pet. App. 124a); Proclamation No. 5564, 51 Fed. Reg. 40,399-40,400 (1986).

Among other things, the Compact settled claims against the United States arising from the nuclear testing program conducted in the Marshall Islands between June 1946 and August 1958. In Section 177 of the Compact, 99 Stat. 1812 (Pet. App. 204a-205a), and a subsidiary Agreement for the Implementation of Section 177 of the Compact (Section 177 Agreement), June 25, 1983, U.S.-Marsh. Is., Hein's No. KAV 1271 (Pet. App. 261a-279a), the Government of the Marshall Islands espoused the claims of its citizens and agreed to settle them.[2] The United States accepted the responsibility for various claims "owing to citizens of the Marshall Islands * * * resulting from the nuclear testing program," including claims "for loss or damage to property [or] person." Compact § 177(a), 99 Stat. 1812 (Pet. App. 204a). And the United States agreed to contribute $150 million to an investment fund to be administered by the RMI and managed by a professional fund manager, with the income and, if necessary, the principal to be disbursed for various purposes, including compensation for claims. Section 177 Agreement Arts. I-II (Pet. App. 262a-269a). The RMI agreed to establish a Claims Tribunal to decide claims "in any way related to the Nuclear Testing Program," including property claims, and to pay tribunal awards from the fund. *Id.* Art. II, §§ 6, 7(b), Art. IV, § 1 (Pet. App. 268a, 271a-272a).

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[2] The Government of the Marshall Islands represented in the Compact that it had "full authority" under the Constitution of the Marshall Islands to fulfill its responsibilities, including the espousal. Compact § 471(a), 99 Stat. 1834 (Pet. App. 246a)

The Section 177 Agreement also included a provision entitled "Changed Circumstances" that authorized the RMI to petition Congress for additional funds under specified conditions. Section 177 Agreement Art. IX (Pet. App. 276a). The agreement specified that "[i]t is understood that this Article does not commit the Congress of the United States to authorize and appropriate [such additional] funds." *Ibid.*

To effectuate the settlement, the Compact itself, the Compact Act, and the Section 177 Agreement all provided that the settlement would serve as the final and unreviewable resolution of any claim that the people of the Marshall Islands might have against the United States. See Section 177 Agreement Art. X, § 1 (Pet. App. 276a) ("This Agreement constitutes the full settlement of all claims, past, present, or future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States"); *id.* Art. XII (Pet. App. 278a) ("All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims"); Compact Act § 103(g)(1), 48 U.S.C. 1903(g)(1) (Pet. App. 144a) ("It is the intention of the Congress of the United States that the provisions of Section 177 of the [Compact] and the [Section 177 Agreement] constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement."); see also Compact § 177(c), 99 Stat. 1812 (Pet. App. 205a) ("[T]he lan-

guage of [the Section 177 Agreement] is incorporated into this Compact.").[3]

The United States and the RMI have subsequently negotiated and adopted amendments to the Compact, see Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720, but the amended Compact expressly states that it "has no effect on * * * Section 177" or on the Section 177 Agreement. § 201(b), 117 Stat. 2808.

2. Petitioners are citizens of the RMI. They seek compensation under the Fifth Amendment's Just Compensation Clause for, *inter alia*, the United States' taking of Bikini and Enewetak Atolls during the nuclear testing program. Petitioners first sought compensation in the early 1980s, when they filed Tucker Act suits in the Court of Claims (*Juda* v. *United States* and *Peter* v. *United States*) on behalf of the inhabitants of Bikini and Enewetak atolls, respectively. Pet. App. 25-28a. Twelve other actions, consolidated under the caption *Nitol* v. *United States*, were filed on behalf of some inhabitants of Rongelap and Utrik and other areas in the Marshall Islands downwind of the test sites. *Id.* at 26a-28a.[4]

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[3] In addition to being an agreement between the United States and the RMI, the Compact has the force of federal law. Compact § 471(c), 99 Stat. 1834 (Pet. App. 247a).

[4] Additionally, thousands of residents of downwind atolls filed suit in the District Court for the District of Columbia pursuant to the Federal Tort Claims Act, seeking damages for personal injuries and death resulting from their exposure to dangerous levels of radiation. *Antolok* v. *United States*, Civil Action No. 83-02471 (D.D.C. June 16, 1987), aff'd, 873 F.2d 369 (D.C. Cir. 1989); see Pet. App. 50a. Micronesian Islanders also filed similar or parallel claims in the Central District of California. *Antolok* v. *Brookhaven Nat'l Labs.*, No. CV 82-2364 (C.D. Cal. Jan. 6, 1988); Pet. App. 101a.

Prior to enactment of the Compact Act, the Claims Court[5] held that the Enewetak plaintiffs' takings claims were barred by the statute of limitations. *Peter* v. *United States*, 6 Cl. Ct. 768, 775 (1984). After the Compact Act became effective, the court dismissed the remaining claims upon the ground that the Compact Act withdrew Tucker Act jurisdiction. *Juda* v. *United States*, 13 Cl. Ct. 667, 689-690 (1987); *Peter* v. *United States*, 13 Cl. Ct. 691, 692 (1987). The Federal Circuit affirmed the dismissal of claims in *Peter* and *Nitol*, adopting the Claims Court's conclusion that the Compact Act withdrew subject matter jurisdiction. *People of Enewetak* v. *United States*, 864 F.2d 134, 136 (1988), cert. denied, 491 U.S. 909 (1989). The court of appeals also dismissed with prejudice an appeal of the *Juda* claimants following the enactment of special legislation appropriating $90 million for the purpose of funding the Resettlement Trust Fund for the people of Bikini. *People of Bikini* v. *United States*, 859 F.2d 1482 (Fed. Cir. 1988).

3. Petitioners subsequently presented their claims to the Nuclear Claims Tribunal established by the RMI pursuant to the Section 177 Agreement. In 2000 and 2001, the tribunal awarded the Enewetak and Bikini petitioners $385.9 million and $563.3 million, respectively. Pet. App. 4a. According to petitioners, the Claims Tribunal has insufficient funds to pay the awards, and the RMI has submitted a "Changed Circum-

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[5] After the cases were filed, Congress transferred the trial functions of the Court of Claims to a newly created United States Claims Court, which has since been renamed the Court of Federal Claims. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 39; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, § 902, 106 Stat. 4516.

stances" petition to Congress for additional appropriations. *Ibid.*[6]

4. In April 2006, petitioners again filed suit against the United States in the Court of Federal Claims, effectively renewing the substance of their earlier claims. Pet. App. 11a; 09-499 Pet. App. 10a. Petitioners also alleged that, by failing to provide funding for the Nuclear Claims Tribunal awards, Congress had deprived petitioners of their property—*viz.*, the Enewetak and Bikini Atolls, as well as their claims before the tribunal—without just compensation, in violation of the Fifth Amendment. Pet. App. 13a; 09-499 Pet. App. 12a. The United States moved to dismiss, arguing principally that the Compact Act withdrew Tucker Act jurisdiction over petitioners' claims. In published decisions dated August 2, 2007, the Court of Federal Claims granted the motions to dismiss. Pet. App. 11a-114a; 09-499 Pet. App. 10a-13a.

5. The court of appeals affirmed. Pet. App. 1a-9a.

The court of appeals held that the Section 177 Agreement settled petitioners' claims and unambiguously withdrew Congress's consent to sue the United States

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[6] In 2007, both Houses of Congress held hearings on the question of additional compensation. See *Republic of the Marshall Islands: Hearing on S. 1756 Before the Senate Comm. on Energy and Natural Resources*, 110th Cong., 1st Sess. (2007); *An Overview of the Compact of Free Association Between the United States and the Republic of the Marshall Islands: Are Changes Needed? Hearing and Briefing Before the Subcomm. on Asia, the Pacific, and the Global Environment of the House Comm. on Foreign Affairs*, 110th Cong., 1st Sess. (2007). As the chairman of the Senate committee recently explained in re-introducing the legislation, changes in administration in both the RMI and the United States have slowed congressional consideration of the RMI's request. 156 Cong. Rec. S54 (daily ed. Jan. 20, 2010) (remarks of Sen. Bingaman); see also S. 2941, 111th Cong., 2d Sess. (2010).

concerning those claims. Pet. App. 7a-8a. Because "[t]he language of the Section 177 Agreement presents no ambiguities whatsoever," the court held, there was no occasion to resolve any ambiguities to avoid constitutional questions. *Id.* at 8a.

The court also noted that petitioners challenged the validity of the Government of the Marshall Islands' espousal and settlement of its citizens' claims. The court held that the challenge to the RMI's capacity to enter into agreements with the United States presented a nonjusticiable political question. Pet. App. 9a (citing *United States* v. *Pink*, 315 U.S. 203, 229 (1942)).

6. Petitioners sought rehearing en banc, which the court denied without recorded dissent. Pet. App. 115a-116a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any precedent of this Court or another court of appeals. The United States and the Marshall Islands settled all claims including the takings claims, and as part of that settlement agreed to preclude further review of those claims in any federal court. The Federal Circuit's application of the straightforward and unambiguous text of the relevant statutory provisions does not warrant further review. And to the extent that petitioners challenge the premise that the Compact settled the claims, they rest on the clearly unavailing theory that Congress and the President could not constitutionally recognize that the Government of the Marshall Islands had the capacity to do so, despite its undertaking to the United States.

1. The court of appeals correctly held that the Compact Act unambiguously withdrew Tucker Act jurisdic-

tion with respect to petitioners' takings claims. That holding does not conflict with any decision of another court of appeals. See *Antolok* v. *United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) ("[In the Compact Act,] Congress could hardly have spoken more explicitly in stripping jurisdiction."). Nor does it conflict with any interpretive principle set out in the decisions of this Court on which petitioners rely: when a statute is unambiguous, the doctrine of constitutional avoidance plays no role in its interpretation. Petitioners insist that there is ambiguity where there is none and the court of appeals discerned none. Petitioners' disagreement with how the courts below read the Section 177 Agreement simply does not warrant further review.

a. As the court of appeals emphasized (Pet. App. 7a), Article X of the Section 177 Agreement, which is entitled "Full Settlement of All Claims," states that the Agreement

> constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, * * * including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including * * * the courts of the United States and its political subdivisions.

Pet. App. 276a-277a. Article XII, entitled "United States Courts," then states:

> All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such

> claims, and any such claims pending in the courts of the United States shall be dismissed.

Id. at 278a.

Congress reiterated its purpose to withdraw jurisdiction in Title I of the Compact Act, which, *inter alia*, sets forth the legal and policy positions of the United States regarding the Compact. Specifically, Section 103(g)(1) of the Compact Act states that "[i]t is the intention of the Congress" that Section 177 of the Compact and the Section 177 Agreement "constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement." 48 U.S.C. 1903(g)(1) (Pet. App. 144a).

b. Petitioners contend that, pursuant to the doctrine of constitutional avoidance, the Federal Circuit should have interpreted the Compact Act as merely requiring exhaustion of procedures before the Claims Tribunal established by the RMI as a precondition to the subsequent filing of a Tucker Act claim against the United States. See 09-499 Pet. 9-10. But in the face of such unambiguous statutory language, petitioners' reliance on the doctrine of constitutional avoidance is altogether unavailing. The court of appeals acknowledged that constitutional avoidance must be considered in resolving statutory ambiguities, Pet. App. 8a, but it saw no ambiguity in the congressional command that "[n]o court of the United States shall have jurisdiction to entertain such claims." And as this Court has often held, where there is no ambiguity, there is no basis for an alternative construction for the purpose of avoiding an asserted constitutional claim. See, *e.g.*, *Department of HUD* v. *Rucker*, 535 U.S. 125, 134-135 (2002); *Miller* v. *French*,

530 U.S. 327, 341 (2000); see also *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009) (describing the canon of constitutional avoidance as "a tool for choosing between competing *plausible* interpretations of a statutory text") (emphasis added; citation omitted). Petitioners offer no plausible reading that would allow them to maintain their claims.

First, there is no merit to petitioners' contention (Pet. 19; 09-499 Pet. 11) that claims alleging that the United States is liable for a shortfall in compensation paid by the RMI's Claims Tribunal are not "based upon, aris[ing] out of, or * * * in any way related to" the nuclear testing program conducted in the Marshall Islands. By definition, any claim brought in the Claims Tribunal must meet that same definition, Section 177 Agreement Art. IV, § 1(a) (Pet. App. 271a), and petitioners indisputably sought compensation for the United States' use of Bikini and Enewetak Atolls during the nuclear testing program. Even if petitioners' only contention in this Court were that the United States had taken, without just compensation, the claims they pursued in the Claims Tribunal, that contention still would necessarily "relate[] to" the nuclear testing program. Indeed, petitioners themselves characterize their claim as seeking to recover a "shortfall" in compensation for their underlying claims arising from the nuclear testing program. 09-499 Pet. 8; see *id.* at 9-10.

Second, the Compact Act is not rendered ambiguous by the mere fact that it does not mention the Tucker Act, 28 U.S.C. 1491(a)(1). See 09-499 Pet. 12-14. The Section 177 Agreement does not need to specifically mention a suit against the United States in the Court of Federal Claims, because it specifies that "[*n*]*o court of the United States* shall have jurisdiction to entertain

such claims." Section 177 Agreement Art. XII (Pet. App. 278a) (emphasis added). Nothing in the cases petitioners cite requires a different rule: those cases dealt with general provisions imposing funding caps, limiting "review," and forfeiting "compensation," but *not* purporting to withdraw jurisdiction from any court, including Tucker Act jurisdiction. See *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 127-129 (1974); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Preseault* v. *ICC*, 494 U.S. 1, 12-13 (1990); *Glosemeyer* v. *Missouri-Kan.-Tex. R.R.*, 879 F.2d 316, 324-325 (8th Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Neely* v. *United States*, 546 F.2d 1059, 1064 (3d Cir. 1976). Here, by contrast, there is just such a withdrawal of jurisdiction; there is no need to specify that "[n]o court" includes the Court of Federal Claims. Cf., *e.g.*, *United States* v. *Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1516, 1518 (2008) (explaining that "the language of the relevant statutes," which provides that '[*n*]*o suit* . . . shall be maintained in *any court* for the recovery of'" specified unlawful taxes unless certain procedures are followed, "emphatically covers" constitutional claims brought under the Tucker Act).[7]

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[7] *INS* v. *St. Cyr*, 533 U.S. 289 (2001), is of no help to petitioners here. In that case, this Court held that an immigration statute providing that "no court shall have jurisdiction to review" certain alien removal orders did not withdraw pre-existing habeas corpus jurisdiction in deportation cases. *Id.* at 311-312. The basis for the Court's holding, however, was evidence of "historically distinct meanings" given to judicial "review" and "habeas corpus" proceedings in the immigration context. *Ibid.* Here, by contrast, there is no such ambiguous term in the Section 177 Agreement's command that "[n]o court of the United States shall have jurisdiction to *entertain* such claims." Section 177 Agreement Art. XII (Pet. App. 278a) (emphasis added).

Nor could Article XII "co-exist[]" with the Tucker Act, 07-499 Pet. 12 (citation omitted), without losing all meaning. Article XII prescribes that "[n]o court of the United States shall have jurisdiction to entertain such claims"; petitioners urge that the Court of Federal Claims *should* have jurisdiction to entertain such claims. Those positions are irreconcilable. In *Monsanto*, for instance, the statute that allegedly ousted Tucker Act jurisdiction could readily be interpreted as an exhaustion provision rather than a bar, see 467 U.S. at 1018, and thus to coexist with Tucker Act jurisdiction. Here, by contrast, reading Article XII to impose only an exhaustion requirement would undo the finality of the "full and final settlement" ratified by Congress.

The implausibility of petitioners' reading is made all the clearer by the role of the RMI's Claims Tribunal under the Compact and the Section 177 Agreement. Congress did not create the Claims Tribunal or agree to pay its awards in full. To the contrary, the Claims Tribunal was created by act of the Nitijela—the legislative body of the RMI—"[i]n furtherance of the desire of the Government of the Marshall Islands to provide an additional long- term means for compensating claims resulting from the Nuclear Testing Program." Section 177 Agreement Art. IV (Pet. App. 270a-271a); see Pet. App. 52a. Claims Tribunal awards are to be paid by the RMI from a fund established from a portion of the $150 million settlement proceeds. Section 177 Agreement Art. II, § 6(c) (Pet. App. 267a). The United States does not participate in those proceedings, which are internal to the RMI; indeed, the tribunal has "no jurisdiction over the United States * * * with respect to claims of the Government, citizens or nationals of the Marshall Islands arising out of the Nuclear Testing Program."

Id. Art. IV, § 1(a) (Pet. App. 271a). The role of the Claims Tribunal is therefore akin to that of the Foreign Claims Settlement Commission in the United States, which considers claims of the United States citizens to facilitate the pro rata distribution of funds the United States might received in a lump-sum settlement with a foreign government. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 680-681 (1981). The RMI's Claims Tribunal therefore cannot plausibly be regarded as a forum for exhausting claims against the United States, as simply one step before a return to the Court of Federal Claims for a suit under the Tucker Act.

The Compact, the Compact Act, and the Section 177 Agreement cannot be read to give the tribunal the task of adjudicating monetary liability on the part of the United States. The United States "fulfill[ed] * * * its obligations under Section 177 of the Compact" by paying the $150 million settlement amount to the Marshall Islands. *Id.* Art. I, § 1 (Pet. App. 262a). Petitioners make no allegation that the United States failed to fund the Claims Tribunal as it agreed to do.

c. Of course, legislative history could not detract from the plain language of Article XII, but in any event petitioners are incorrect in their contention that "nothing in the legislative history of Section 177 evidences Congress's intent affirmatively to prevent a Tucker Act claim as a constitutional backstop to the Tribunal process." 09-499 Pet. 14. In approving the Compact Act in 1985, the House Committee on Foreign Affairs explained in relevant part:

> A number of lawsuits have been lodged against the United States Government by individuals from various islands in the Marshalls, seeking approximately $5 billion in damages stemming from our nu-

clear weapons testing program. With the exception of the Bikini rehabilitation lawsuit, none of these suits have been resolved yet.

Section 177 of the compact provides for a *comprehensive settlement* of *all of these lawsuits* and *any future claims against the United States*. Under the terms of this provision, the United States Government will provide the Government of the Marshall Islands with a $150 million trust fund as just, adequate, and *full settlement of all claims against the United States* and its agents in regard to the Marshall Islands and its citizens resulting from the nuclear weapons testing program. The Government of the Marshall Islands will espouse and settle these claims *and foreclose all further adjudication of them in the courts of the United States*.

H.R. Rep. No. 188, 99th Cong., 1st Sess., Pt. 1, at 8 (1985) (emphasis added). Thus, Congress was well aware when it provided that "any such claims pending in the courts of the United States shall be dismissed," Section 177 Agreement Art. XII (Pet. App. 278a), that it was directing the dismissal of claims under the Tucker Act. See p. 5, *supra*.

2. Petitioners are likewise incorrect in their contention that the court of appeals erroneously rejected their constitutional arguments. Indeed, the court of appeals did not need to discuss those constitutional arguments at any length at all, because of the unique fact that separates this case from all of those petitioners cite: petitioners' claims were settled. Indeed, the jurisdictional provision that controls this case was a part of the settlement agreement. By contrast, every case petitioners cite involved *live* takings claims.

Thus, before this Court could even reach the constitutional claims petitioners press here, it would have to agree with petitioners on the threshold argument that the RMI did not validly espouse and settle its citizens' claims. See Pet. 22-24; 09-499 Pet. 19. Even if this Court's precedents permitted judicial review of that question (which they do not, as the court of appeals correctly recognized), petitioners' arguments about the RMI's capacity to carry out its commitment in the Compact and the Section 177 Agreement are not well taken. No further review of those issues is warranted.

a. The Compact recognizes the self-determination of the Marshallese people. See Compact preamble, 99 Stat. 1800 (Pet. App. 181a). Indeed, before the Compact was ever presented to Congress, the Marshallese people had considered it and approved it by plebiscite. At the time Congress acted, therefore, the people of the Marshall Islands had formed a body politic that was capable of treating with the United States. The Compact is phrased in just such terms. *Ibid.*[8] Moreover, the Compact's Section 177 Agreement, which effected the espousal, was negotiated and executed by Marshall Islands representatives on behalf of their government, and countersigned by a United States Ambassador appointed by President Reagan. See Section 177 Agreement, Hein's No. KAV 4575, at xviii; see also Pet. App.

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[8] It has long been recognized that Trust Territory inhabitants were not United States citizens, and that the Trust Territory was not part of the sovereign territory of the United States. See *Porter* v. *United States*, 496 F.2d 583, 587-590 & n.4 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975); see also Trusteeship Agreement Art. 11(1), 61 Stat. 3304, 8 U.N.T.S. 196 (Pet. App. 287a) (the United States "shall take the necessary steps to provide the status of citizenship *of the trust territory* for the inhabitants of the trust territory") (emphasis added).

248a; Arthur J. Armstrong & Howard L. Hills, *The Negotiations for the Future Political Status of Micronesia (1980-1984)*, 78 Am. J. Int'l L. 484 (1984). And the principle that one sovereign may espouse and settle claims by its nationals against another sovereign is well established, as petitioners acknowledge. Pet. 24 n.8; *Dames & Moore*, 453 U.S. at 679 (agreements between nations "settling the claims of their respective nationals" are "'established international practice'") (quoting Louis Henkin, *Foreign Affairs and the Constitution* 262 (1972)).

In entering into the Compact and the Section 177 Agreement, the political Branches necessarily agreed that the Government of the Marshall Islands possessed the authority to espouse and settle the claims of its nationals. See Compact § 471(a), 99 Stat. 1834 (Pet. App. 246a) ("The Government of the United States and the Government[] of the Marshall Islands * * * agree that they have full authority under their respective Constitutions to enter into this Compact and its related agreements and to fulfill all of their respective responsibilities in accordance with the terms of this Compact and its related agreements."). That determination is not subject to the sort of judicial second-guessing that petitioners invite.[9]

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[9] The Bikini petitioners contend, for instance, that the Government of the Marshall Islands lacked capacity to espouse and settle their claims without *their* express participation. 09-499 Pet. 19. The legal basis for that assertion is unclear, and indeed, the Bikini petitioners disavowed any such argument in the court of appeals. See 2007-5175 Pet. C.A. Reply Br. 19 ("[T]he government * * * insist[s] that the Bikinians' claim is a challenge to the United States' recognition of the Marshall Islands government and the purported espousal of the Bikinians' claim. *But the Bikinians are making no such argument.*") (emphasis added; citation omitted). In any event, the people of the

Because petitioners challenge the very capacity of the United States' compacting partner to carry out the Compact, their challenge is not justiciable. Such a challenge goes far beyond the traditional judicial function of *interpreting* a treaty, as in the cases petitioners cite (Pet. 29). Rather, petitioners' argument amounts to a "disapproval or non-recognition" of not only the espousal, but also the United States' agreement to recognize the Government of the Marshall Islands as having the capacity to espouse and settle claims of its citizens. *United States* v. *Pink*, 315 U.S. 203, 232 (1942). As the court of appeals observed, these types of recognition, political, and policy questions are excluded from judicial review. See *id.* at 229-232 ("Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.") (citing *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937)).[10]

Similarly, in *Doe* v. *Braden*, 57 U.S. (16 How.) 635 (1854), this Court upheld and applied a provision of the 1819 treaty of cession (and an attached declaration) expressly invalidating several grants that the King of Spain had made, while the treaty negotiations were underway, of lands later ceded by the treaty. Although the

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Marshall Islands themselves approved by plebiscite the Compact provision authorizing the settlement of "all such claims."

[10] In *Pink*, this Court held the political question doctrine barred judicial review of the claims of foreign creditors who challenged the Soviet Government's nationalization of Russian property, an act that "the United States by its policy of recognition agreed no longer to question." 315 U.S. at 231. So too here: petitioners challenge the Government of the Marshall Islands' espousal, reflected in the Compact and the Section 177 Agreement, an act that the United States, under its policy of recognition, likewise acknowledged and accepted.

Spanish grantees' successors contended that the King lacked power to agree to extinguish their rights in that manner, this Court explained that it would not second-guess the political Branches' exercise of the powers to recognize nations and make treaties, and thus would not examine the competence of the United States' treaty partner to make the agreement. *Id.* at 657-658.

b. Petitioners assert that a different rule should apply here, on the theory that before it entered into the Compact, the Marshall Islands lacked the capacity to espouse their claims because it was not a sovereign government but, rather, was under the United States' authority and control. Pet. 23-27; 09-499 Pet. 19.[11] That contention is at odds with the Compact itself, which explains that the Marshall Islands negotiated and entered into the Compact to establish a "government-to-government relationship[]" with the United States. Compact preamble, 99 Stat. 1800 (Pet. App. 181a).

The Marshall Islands had adopted a constitution and negotiated a compact of free association, and the United Nations Trusteeship Council had approved the termination of its trusteeship status. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986); T.C. Res. 2183, U.N. Doc. T/RES/2183 (May 28, 1986).[12] Thus, petitioners would have to establish that a trust territory in that position may not, in negotiating the compact by which it leaves trust-territory status, espouse the claims of its citizens as any other sovereign can, even though the espousal

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[11] Indeed, the Enewetak petitioners concede that if the Government of the Marshall Islands was a sovereign government for these purposes, it could espouse and settle its citizens' claims against another sovereign. Pet. 24 n.8.

[12] The Security Council later ratified the Trusteeship Council's recommendation. S.C. Res. 683, U.N. Doc. S/RES/683 (Dec. 22, 1990).

takes effect only once the compact itself becomes effective, the former territory is confirmed as "self-governing" with "the capacity to conduct foreign affairs," Compact §§ 111, 121(a), 99 Stat. 1801, and the United States formally recognizes the nation's new status, see Proclamation No. 5564, 51 Fed. Reg. at 40,400. Petitioners cite nothing to support their contention that the Constitution prohibits the political Branches from recognizing an espousal and settlement of claims in those circumstances—and accepting that contention would greatly undermine the ability of the United States to provide for the full independence of a trust territory through a process of negotiation with the representatives of the duly constituted government of that territory.

In any event, petitioners offer no reason why this Court's review would be warranted to consider the status of the Marshall Islands before the 1986 Compact. That question lacks recurring significance. Indeed, there are no more United States trusteeships; the last remaining United States trust territory, Palau, became independent in 1994. Proclamation No. 6726, 59 Fed. Reg. 49,777 (1994).

c. Finally, contrary to petitioners' assertion, the Federal Circuit's decision does not conflict with this Court's decision in *Dames & Moore*. Petitioners seize upon the Court's statement that, "to the extent [Dames & Moore] believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." *Dames & Moore*, 453 U.S. at 689-690; see Pet. 28. The Court made that statement, however, in reference to the so-called "treaty exception" to the jurisdiction of the Court of Claims, 28 U.S.C. 1502, not to the political question

doctrine. See *Dames & Moore*, 453 U.S. at 689. Moreover, *Dames & Moore* did not present, as here, an issue respecting a foreign government's capacity to espouse claims, or the United States' recognition of that authority.

3. Petitioners argue that the Federal Circuit's decision conflicts with decisions of this Court and other circuits holding that the Just Compensation Clause is "self-executing." In this regard, petitioners maintain that claims for just compensation are self-executing, that they are vested within the jurisdiction of the federal courts by the force of the Just Compensation Clause, and that such jurisdiction is not dependent upon, and cannot be foreclosed by, any congressional enactment. According to petitioners, the Federal Circuit's decision permits Congress to evade its constitutional duty to pay just compensation by holding that Congress may create an exclusive, alternate tribunal to decide just compensation claims, but refuse to pay fully the awards of the alternate forum. Pet. 13-16, 09-499 Pet. 16-21. Petitioners' contention lacks merit and does not warrant further review.

a. The Federal Circuit did not address the scenario petitioners spin out. Rather, the court held that, as part of its ratification of the Compact and settlement of all claims, Congress unambiguously withdrew jurisdiction pursuant to the claims settlement. Pet. App. 6a-8a. Petitioners offer no reason why Congress cannot, within the bounds of the Just Compensation Clause, withdraw Tucker Act jurisdiction over a class of claims that have been fully and finally settled. To the contrary, petitioners acknowledged in the proceedings below that "[w]ithdrawing jurisdiction over claims that have been validly settled and released is perfectly constitutional." 2007-

5175 C.A. App. A1000-A1002; accord 2007-5176 C.A. App. A428. That concession alone warrants denial of the petitions.

At bottom, the Federal Circuit correctly recognized that this case involves a foreign country that has espoused and settled its nationals' claims in the context of an international compact. The Compact withdraws federal jurisdiction in clear terms and, instead, authorizes the independent government of the RMI to petition Congress for additional relief on behalf of its citizens. The RMI has done so, and its request is pending before Congress, the appropriate interlocutor. See note 6, *supra*.

For those reasons, even if the statutes here were ambiguous, there simply is no substantial constitutional question that would justify imposing a saving construction. Whether or not the Government of the Marshall Islands lacked the capacity to espouse claims, the fact remains that Congress has withdrawn federal jurisdiction based upon its determination that the Compact effected a "full and final settlement." And that settlement involved the provision of a substantial sum of money for a number of purposes, including compensation of those with outstanding claims. This case therefore does not present a situation like that in the *Regional Rail Reorganization Act Cases*, in which the only compensation offered under the challenged statute—*i.e.*, common stock in an "unproved entity" of highly questionable value, perhaps zero (419 U.S. at 137 & n.21)—was coupled with Congress's apparent determination that it would not appropriate any funds "beyond those expressly committed by the Act." *Id.* at 127.

b. Although the question is not presented here, there is no merit to petitioners' assertion that Congress is powerless to withdraw Federal court jurisdiction with

respect to suits for just compensation. Petitioners correctly note that the Just Compensation Clause's "self-executing" character means that the clause itself provides a substantive right to compensation where the government has taken property. The existence of that substantive right, however, does not prevent Congress from withdrawing its consent to suit in the Tucker Act. Congress may decline to waive the sovereign immunity of the United States, or may withdraw consent to suit that was previously given, even if the underlying claim may be one of constitutional dimension. See *Lynch* v. *United States*, 292 U.S. 571, 581 (1934); *Antolok*, 873 F.2d at 373-375.[13]

Had Congress chosen to do so, it could constitutionally have enacted only the withdrawal of consent for petitioners to sue the United States, while otherwise leaving their underlying claims unaffected and making no *advance* legislative provision for their ultimate resolution. It follows that Congress' action here is not rendered unconstitutional by virtue of the facts that the same Act of Congress that withdrew Tucker Act jurisdiction also approved a settlement of the claims and provided for a lump-sum payment of $150 million for those and other purposes, and that, in the Section 177 Agreement, the Government of the Marshall Islands also un-

[13] Prior to the enactment of the Tucker Act in 1887, Congress had not waived the sovereign immunity of the United States with respect to suits for just compensation. See *Langford* v. *United States*, 101 U.S. 341, 343 (1880). Consequently, plaintiffs whose property had allegedly been taken by the Government for public use were constrained to pursue relief directly from Congress or in the courts under alternate legal theories—for example, by seeking possession of the property through a suit for ejectment against a Government official, rather than bringing a suit against the United States itself. *E.g.*, *United States* v. *Lee*, 106 U.S. 196, 218-223 (1882).

dertook to establish its own claims tribunal mechanism to decide the amount of compensation that, in its assessment, should be paid for injuries resulting from the nuclear testing program.

c. There is likewise no merit to the Bikini petitioners' contention (09-499 Pet. 14-21) that the Federal Circuit's decision conflicts with prior decisions holding that a Tucker Act remedy "cannot be defeated by congressional design." In *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948), the Second Circuit did not address a withdrawal by Congress of the consent to sue the United States; rather, the case involved a dispute between private parties to recover overtime pay in accordance with the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* In *Wisconsin Central Ltd.* v. *Public Service Comm'n*, 95 F.3d 1359 (7th Cir. 1996), a suit seeking declaratory and injunctive relief against rules regarding conditions required for utilities to place transmission facilities across railroad rights-of-way, the Seventh Circuit generally observed that "[t]he just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy." *Id.* at 1368. As in *Battaglia*, the court did not address a withdrawal by Congress of its consent to sue the United States under the Tucker Act. Accordingly, there is no conflict between those decisions and this one.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010